



May 16, 2002

Mr. Kuruvilla Oommen  
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City of Houston - Legal Department  
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OR2002-2615

Dear Mr. Oommen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162957.

The City of Houston (the "city") received a request for the final negotiated contract and all proposals submitted "in regards to the 69<sup>th</sup> Street Wastewater Treatment/TC-0-767-027-12900 request for proposal bid invitation." Pursuant to section 552.305 of the Government Code, the city notified Air Products and Chemicals, Inc. ("APCI") and Lotepro Corporation ("Lotepro"), the interested third parties, of the request because their proprietary interests are implicated.<sup>1</sup> As of the date of this ruling, this office has not received a response from Lotepro. Therefore, we have no basis on which to conclude that the responsive information of Lotepro is excepted from disclosure, and it must be released to the requestor. This office has received a response from APCI objecting to the release of some of its information. We have considered the arguments of APCI and have reviewed the submitted information.

We first note that APCI does not object to the release of any part of its contract with the city. Therefore, this information must be released. However, APCI claims that some of the information in its bid proposal is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial

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<sup>1</sup>See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>2</sup> If, as is true here, the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the requested information, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990) (addressing statutory predecessor); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958).

Under section 552.110(b), the governmental body or private entity must provide a specific factual or evidentiary showing, and not conclusory or generalized allegations, that substantial competitive injury likely would result from the release of the information at issue. *See* Open

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Records Decision No. 661 at 5-6 (1999) (addressing required showing); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

We first address APCI's claim that the customer and project information that composes Appendix E of its proposal is excepted under section 552.110. APCI argues that release of the client contact and project information in Appendix E would allow competitors to learn detailed information not otherwise available about the duration and nature of APCI's projects and its customer base. As a result, competitors could target customers so as to take business away from APCI. Further, APCI explains that this is the type of information that is maintained internally by certain select management personnel for marketing and business evaluation purposes, is not generally available within APCI, and is never made available to competitors either verbally or in writing. Based on APCI's arguments and our review of the relevant information, we conclude that section 552.110(a) applies to the information. Because APCI has made a *prima facie* case that this information qualifies as a trade secret and no argument has been presented that rebuts the claim as a matter of law, the city must withhold Appendix E from disclosure under section 552.110(a). *See* Open Records Decision No. 552 at 5.

APCI also seeks to withhold the pricing schedule and controls contained in Appendix H of its bid proposal under section 552.110(a). This information, APCI explains, includes rate variation provisions for a type of potential oxygen purification project. APCI makes clear that the information at issue here is not the pricing information developed for its bid for the city project, but instead reflects pricing and pricing procedures used in its operations around the world. APCI further states that the release of this information would provide a map by which competitors could underbid APCI prior to bid negotiations or force it to lower its prices. APCI asserts that its pricing model is unique and provides it with a competitive advantage, and that its competitors could not independently duplicate it even after spending hundreds or thousands of dollars and unlimited time on research. Further, APCI's customers are expected to maintain the confidentiality of this pricing information during negotiations and while conducting business with APCI. Based on APCI's arguments and our review of Appendix H, we conclude that APCI has established that section 552.110(a) is applicable to this information. Because APCI has made an un rebutted *prima facie* case that the information constitutes a trade secret, Appendix H must be withheld under section 552.110(a). *See id.*

Next, APCI claims that the policies and procedures contained in Appendices F-2 and F-3 are confidential under section 552.110. APCI argues that their internal safety and construction procedures were designed to make APCI a leader in the area of safety and construction and thereby elevate its position in the marketplace. Further, according to APCI, these methods and procedures for handling a project are unique and allow APCI to offer greater quality of services and products in a cost-efficient manner. Both the safety and construction procedures and the corporate policies and procedures were developed after years of research and significant expenditures of money and employee time, APCI argues. In addition, APCI claims that competitors do not have access to such procedures, and their release would allow

competitors to incorporate them and thereby become more marketable through APCI's experience, expenditures, and efforts to set itself apart from competitors. Based on APCI's arguments and our review of the relevant information, we conclude that Appendices F-2 and F-3 constitute commercial or financial information that must be withheld from disclosure under section 552.110(b).

APCI further contends that its operation model and procedures contained in Appendix G of its bid proposal are excepted under section 552.110. Based on APCI's representations and our review of the information, we conclude that the city must also withhold Appendix G under section 552.110(b).

In summary, the city must withhold Appendices E and H of APCI's bid proposal under section 552.110(a). The city must withhold Appendices F-2, F-3, and G under section 552.110(b). The remaining requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 162957

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